No. 85-1716

In The
Supreme Court of the United States
October Term, 1985

JEAN E. WELCH,

Petitioner,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION and THE STATE OF TEXAS,

Respondents.

ORIGINAL BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION AND THE STATE OF TEXAS ARE IMMUNE FROM A JONES ACT SUIT IN FEDERAL COURT BY A STATE EMPLOYED SEAMAN BY OPERATION OF THE ELEVENTH AMENDMENT OF THE U.S. CONSTITUTION.

2. WHETHER THE STATE OF TEXAS HAS WAIVED ITS IMMUNITY TO A JONES ACT SUIT BY A STATE EMPLOYED SEAMAN.

PARTIES TO THIS PROCEEDING

Pursuant to Rule 34(1)(b), the following is a list of all parties to this proceeding:

1. JEAN ERICKSON WELCH, PETITIONER
2. STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, RESPONDENT
3. STATE OF TEXAS, RESPONDENT

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3. Reproduced in the Joint Appendix to the Petition for Writ of Certiorari, pp. 1a - 46a.

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JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

An appeal was timely taken from the dismissal of this action by the U.S. District Court. The District Court granted a Motion to Dismiss on March 1, 1982. (J.A. p.2, NR 13). The District Court then denied Welch's Motion to Amend the Order Dismissing the State Department of Highways and Public Transportation in order to allow immediate appeal pursuant to 28 U.S.C. 1292(b). (J.A., p.3, NR 20).

Final Judgment was thereafter entered by the District Court on April 1, 1983 (J.A., p. 7, NR 70). Notice of Appeal to the U.S. Court of Appeals was timely filed on May 2, 1983 (J.A., p.7, NR 71).

The U.S. Court of Appeals rendered its decision on August 27, 1984 and an en banc suggestion was granted on October 31, 1984.

The en banc U.S. Court of Appeals decided this case on January 22, 1986 and a Petition for Writ of Certiorari was filed on April 21, 1986. Certiorari was granted on October 6, 1986.

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CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment XI.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. Constitution, Article III, Section 2

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall

> be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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STATUTES

46 U.S.C. § 688

> any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in case of personal injury to railroad employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action on all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

45 U.S.C. § 51

> Every common carrier by railroad while engaging in commerce between any of the several States or Terri-

tories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Tex. Rev. Civ. Stat. Ann., art. 6252-19, Sec. 3

Each unit of government in the state shall be liable for money damages for property damage or personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor-driven vehicle and motor-driven equipment . . . under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible

property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state.

Tex. Rev. Civ. Stat. Ann., art. 6252-19, Section 4

To the extent of such liability created by Section 3, immunity of the sovereign to suit, as heretofore recognized and practiced in the State of Texas with reference to units of government, is hereby expressly waived and abolished, and permission is hereby granted by the legislature to all claimants to bring suit against the State of Texas, or any and all other units of government covered by this Act, for all claims arising hereunder.

Tex. Rev. Civ. Stat. Ann., art. 6674s, Section 6

Sec. 6. Employees of the Department and parents of minor employees shall have no right of action against the agents, servants, or employees of the Department for damages for personal injuries nor shall representatives and beneficiaries of deceased employees have a right of action against the agents, servants, or employees of the Department for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Department as is provided in this law. All compensation allowed herein shall be exempt from garnishment, attachment, judgment, and all other suits or claims, and no such right of action and no such compensation and no part thereof nor of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void.

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STATEMENT OF THE CASE

Petitioner Jean Welch was injured on March 4, 1981 while working as a marine technician on the ferry landing dock at Galveston, Texas. She sued both her employer, the State Depuartment of Highways and Public Transportation and the State of Texas in federal court under the Jones Act. She also sued the manufacturer of the crane, Drott Manufacturing Co., a division of J.I. Case Company in a products liability action.

The Highway Department of the State of Texas operates on a twenty-four hour basis a free automobile and passenger ferry between Point Bolivar and Galveston, Texas, across the waters which constitute the entrance to the Port of Houston. The length of the ferry boat journey is approximately three miles. Without a ferry boat, a person wishing to travel between Port Bolivar and Galveston would have to drive approximately 130 miles. Petitioner was an employee of the State Department of Highways and Public Transportation and in the scope of her employment when she was injured. Petitioner alleged seaman status in her Original Complaint (J.A., p. 9, para. IV Original Complaint) and her status is not an issue.

Petitioner's employer was insured under the Texas Worker's Compensation Act at all relevant times herein.

The circumstances of Petitioner's injuries are that while working on the dock she was instructed by her foreman to assist in raising a work barge from the waters below to the dock by means of a mobile crane. The mobile crane, operated by a co-employee, overturned because its maximum load rating was exceeded and the "outriggers" were not used. As a result, Petitioner was crushed by the mobile

crane into the guardrail on the dock. (J.A. p. 10, para. V. of Original Complaint). The products liability cause of action was tried to verdict and the judgment was satisfied and therefore is not part of this appeal.

Petitioner's Jones Act claim was dismissed by the District Court on the assertion of Eleventh Amendment immunity by the State of Texas and the State Department of Highways and Public Transportation. (J.A. to Petition for Writ of Certiorari, pp. 75a - 81a). Petitioner appealed and the U.S. Court of Appeals for the Fifth Circuit reversed the District Court in its decision of August 27, 1984. (J.A. to Petition for Writ of Certiorari, pp. 49a - 74a). Thereafter, the Fifth Circuit granted the application of Respondents for en banc hearing and affirmed the District Court dismissal on January 22, 1986 (J.A. to Petition for Writ of Certiorari, pp. 1a - 46a).

Petitioner applied for a writ of certiorari on April 21, 1986 and her Petition for Writ of Certiorari was granted on October 6, 1986.

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SUMMARY OF THE ARGUMENT

Petitioner Welch argues that she is entitled to proceed with her Jones Act suit in federal court on the grounds that the Jones Act preempts the state's immunity granted by the Eleventh Amendment because the Constitution grants the exclusive regulation of admiralty and maritime matters to the Congress by Article III, Section 2. Furthermore, in a *Pardon* approach, Petitioner suggests that the

State of Texas, by operation of navigable vessels and employment of seaman such as Welch, have constructively consented to the application of the Jones Act and cannot assert Eleventh Amendment immunity as a defense. Petitioner suggests that the Constitutional grant of exclusive regulation of maritime matters to Congress abrogates the Eleventh Amendment immunity and that the Jones Act remedy does apply to the states in federal court. To hold otherwise would provide Petitioner a right without a remedy.

Alternatively, Petitioner argues that the statutory provisions of the State of Texas clearly waive its immunity. The waiver of immunity by the State of Texas in Section 4 of Article 6252-19 of the Texas Revised Civil Statutes is a waiver of Eleventh Amendment immunity and dictates a reversal by this Court.

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ARGUMENT

The Merchant Marine Act of 1920 (commonly referred to as the Jones Act) provides in applicable part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . .
>
> 41 Stat. 1007; 46 U.S.C. 688.

Pursuant to the Jones Act, Petitioner Welch sought damages against her employer, the Texas State Department of Highways and Public Transportation for injuries resulting from the negligence of a co-employee. Her suit was dismissed by the District Court (J. Cire) and the dismissal was affirmed by a divided Fifth Circuit en banc court on the ground that the state is immune from an employees' Jones Act claim in federal court by operation of the Eleventh Amendment to the United States Constitution.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of theUnited States Citizens of another State or by Citizens or Subjects of any Foreign State.
>
> U.S. Constitution, Amendment XI.

The issue which arises between the competing interests of the state employed seaman by virtue of her Jones Act rights and the state by virtue of its Eleventh Amendment immunity must be resolved favorably to the Petitioner for the following reasons: (1) the regulation of maritime policy is entirely vested in the federal government pursuant to the plenary power granted to Congress by Article III, § 2 of the Constitution; (2) the states' immunity has been abrogated by entry into the federally regulated sphere of admiralty and maritime activity; and (3) the Jones Act therefore abrogates the Eleventh Amendment immunity of the state as to a state employed seaman.

1. HISTORY AND PURPOSE OF THE ELEVENTH AMENDMENT

The Eleventh Amendment stands for the proposition that a Citizen may only sue a State in Federal Court with that State's consent. Enacted in response to *Chisholm v.*

Georgia, 2 U.S. (2 Dall.) 419 (1793) the purpose of the amendment was to protect the fiscal integrity of the several states by prohibiting the imposition of money judgments against the states by Federal Courts.[1] The immunity afforded the states is based upon the common-law doctrine of sovereign immunity and has long been considered an essential attribute to the States.

> That a state may not be sued without it's consent is a fundamental rule of jurisprudence having so import- of the United States that it has become established by ant a bearing upon the construction of the Constitution repeated decisions of this Court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by it's own citizens, because of the fundamental rule of which the amendment is but an exemplification.
>
> *In re State of New York,* 256 U.S. 490, 497 (1921) and cases cited therein.

Moreover, it is well settled that the Eleventh Amendment immunity afforded states from suits by foreign citizens has been interpreted to include suits against a state by a citizen of this own state. *Hans v. Louisiana,* 134 U.S. 1 (1890), *Great Northern Life Insurance Company v. Read,* 332 U.S. 47, 64 S.Ct 873 (1944).

Additional expansion beyond the explicit language of the amendment has held that sovereign immunity also applies

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[1]*Jagnandan v. Giles,* 538 F.2d 1166 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977).

to suits by a foreign nation. *Monaco v. Mississippi,* 292 U.S. 313, 54 S.Ct. 745 (1934).

The intention of the framers as to maritime matters first underwent analysis and interpretation in *Ex Parte Garnett,* 141 U.S. 1, 11 S.Ct. 840, 35 L.Ed. 631 (1891). Therein, the Court stated:

> . . . the Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution arrived or all subjects of commercial character affecting the intercourse of the states with each other or with foreign states.
>
> *Ex Parte Garnett,* 141 U.S. 1, 13 (1891)

There have been no departures from the conclusion of the court in Garnett that uniformity and consistency concerning maritime law is required and is solely within the ambit of Congress.

In *Workman v. Mayor, Alderman, and City of New York,* 179 U.S. 553, 21 S.Ct. 2112, 45 L.Ed. 314 (1900) this Court emphasized the need for exclusive federal regulation in admiralty and maritime activities, notwithstanding the fact that such maritime activities were private or state operated. As Article III, § 2 of the Constitution grants judicial power of the United States "to all cases of admiralty and maritime jurisdiction", there seems little room for doubt that the *Garnett* and *Workman* decisions coincide with the intentions of the framers.

The majority holding for the en banc Fifth Circuit by Judge Williams focuses on the absence of expressed state

waiver of immunity in the present case, and dismisses somewhat categorically the holding in *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). *Jensen* stands for the proposition that state workers' compensation statutes cannot apply to injuries occuring on navigable waters. The majority concludes that the Respondent herein may enact a state workers' compensation scheme for its maritime employees.

> This leaves the state free to provide workers' compensation for injuries to its own employees as against a suit in federal court. Otherwise, there would be a federally imposed remedy abrogating sovereign immunity without expressed intention to impose such a remedy. In terms this is inconsistent with *Atascadero* and also the principle of the political control of federal regulation by the states acting through the Congress which the Court emphasized in the *Garcia* case.
>
> *Welch v. State Dept. of Highways and Public Transp.*, 780 F.2d 1268, 1274 (5th Cir. 1986).

If, in fact, a state may freely enact such legislation requiring its maritime employees to submit to a state workers' compensation scheme, (as the majority concludes) does the plenary power of Article III, § 2 of the Constitution remain intact? Petitioner suggests that the conclusion of the majority that "such an unconstitutional conditions analysis [of *Southern Pacific v. Jensen*] *is not relevant* here" ignores the intent of the framers to establish a uniform maritime policy in the Congress and contradicts well established principles of federalism under the plenary power over maritime and admiralty matters. Congress' power to regulate maritime activities arises from Article I, § 8 of the Constitution which grants the power

> . . . to make all ways which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or offices thereof.
>
> U.S. Constitution, Art. I, § 8

The application of immunity to the state in maritime policy and regulation has consistently been denied by this Court. In *Southern Pacific v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), this court stated:

> it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.
>
> *Id.*, at 215.

Further consistent denial of the state immunity was set forth in *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920) wherein the Court stated "the necessary consequence of [any other conclusion] would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish." *Id.*, at 156.

Moreover, in *State of Washington v. Dawson & Co.,* 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646 (1924) this Court affirmed the principle of federal preemption in maritime and admiralty matters by its holding that state statutes may not contravene federal policies or regulations such as this Respondent seeks herein.

> . . . well established is the rule that state statutes may not contravene an applicable act of Congress, or affect the general maritime law. . . . No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works a material prejudice to the characteristic features of the general maritime

law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

Id., at 244.

Respondent seeks to shield itself from the suit of Petitioner by asserting its sovereign immunity as a substantive and jurisdictional defense. Construction of the shield is sought in the decisions of *Employees of the Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare,* 411 U.S. 279, 93 S.Ct. 1614, 34 L.Ed. 2d. 251 (1973), *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974), *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. —, 105 S.Ct. 1005, 83 L.Ed. 2d 1016 (1985), and *Atascadero State Hospital & California Dept. of Mental Health v. Douglas James Scanlon,* 473 U.S. —, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985). Assuming *arguendo* that these enumerated decisions relied upon the Respondent and the en banc majority of the Fifth Circuit compel this Court to affirm the dismissal of the suit of Petitioner, the result constitutes a derogation of the plenary power grant to Congress and carves a judicial exception for state employed seamen under the Jones Act. It is abundantly clear that the Jones Act was enacted pursuant to Congress' maritime and admiralty powers. *Panama Railroad Co. v. Johnson,* 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924); *Engel v. Davenport,* 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 831 (1926); *In Re Health,* 144 U.S. 92, 12 S.Ct. 615, 36 L.Ed. 358 (1892). It is equally clear that the result as reached by the Fifth Circuit is not permissible unless the federal regulation of admiralty and maritime matters is to be abrogated by the judiciary. In *Ex Parte Garnett,* 141 U.S. 1, the Court said:

> The Constitution extends the judicial power of the United States to 'all cases, of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the National Legislature, and not in the State Legislature.
>
> *Id.*, at 14.

There can be no compliance with the required federally regulated maritime activity except by reversal of this matter. With the sole exception of *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed. 2d 804 (1959), there have been no decisions which have interpreted Congress' plenary power over maritime matters. Even the watermark decision in *Parden v. Terminal Railway Co.,* 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed. 2d 233 (1964) was a commerce clause case which concluded that state immunity was abrogated by the entry of Alabama into a federally regulated sphere of activity which provided FELA remedies to employees. Thus, the majority opinion of the en banc Fifth Circuit is a departure from the standard which grants Congress exclusive power over admiralty and maritime matters and should be reversed.

The Fifth Circuit opinion that *Parden* and *Petty* are no longer viable is not supported by more recent decisions on state immunity. Although the degree of congressional intent required to overcome the Eleventh Amendment shield in non-maritime areas has vacillated in recent years — there has been no rejection of or retreat from the principle that maritime and admiralty matters are within the exclusive control of Congress. Application of this principle to the contrasting decisions relied upon by the Fifth Circuit majority do not compel a rejection or retreat from the stated principle.

For instance, in *Employees v. Dept. of Public Health and Welfare,* 411 U.S. 279 (1973) the Supreme Court distinguished *Parden* and declined to extend its rationale to the Fair Labor Standards Act.[2]

> The dramatic circumstances of the Parden case, which involved a rather isolated state activity can be put to one side . . . It is true that, as the Court said in Parden, 'the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191, 84 S.Ct., at 1212. But we decline to cover every exercise by Congress of its commerce power, . . .
>
> *Id.*, at 285, 286-287.

The majority opinion below misconstrues the decision in *Employees* as a limitation on the power of Congress to act within the realm of admiralty and and maritime matters.[3] Nowhere does *Employees* suggest any application of the decision to the plenary power granted Congress over admiralty and maritime matters. However, the Court in *Employees* went to great lengths to distinguish an isolated proprietary activity as found in *Parden* from the governmental function in *Employees.* The decision in *Employees* followed *Maryland v. Wirtz,* 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) which held that Congress could regulate the states as an employer by imposing minimum

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[2]29 U.S.C., 201 et seq; (1938, as amended).

[3]Circuit Judge Williams' majority opinion states: "But the broad sweep of the *Parden* decision, although it has not been overruled has overtly been limited by later decisions as its full implications have surfaced . . . because in the *Missouri Public Health and Welfare* case the Supreme Court modified *Parden* by holding that Congress must express itself in "clear language" to cause a private federal remedy for employees to be applicable to state employees. *Welch,* at p. 1270.

wages on them. The approach in *Employees* reflects the concern of this Court undertaken to establish a criteria for determining circumstances to find that federal preemption or congressional abrogation is appropriate. In an effort to set forth this test, the Court first required the "clear statement" within the statute itself to the states, presumably in the Act. Undoubtedly the Court had the option to overrule *Parden*—but did not. Nor should the significance of this passed opportunity be lost in that this Court decided *Edelman v. Jordan,* 415 U.S. 651 (1974) just one year after *Employees.* Once again presented with an opportunity to overturn or discredit the *Parden* decision, the Court declined. *Edelman* arose from Plaintiffs seeking injunctive relief to compel future compliance and monetary payments of withheld benefits from a state-administered, federally subsidized program[4] known as the AABD. Justice Rehnquist wrote for the majority that:

> Both *Parden* and *Employees* involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included states or state instrumentalities. Similarly, *Petty v. Tennessee-Missouri Bridge Commission, supra,* involved congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power 'to contract, to sue, and be sued in its own name.' The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation

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[4]42 U.S.C. §§ 801-805, Aid to the Aged, Blind and Disabled.

> in the program authorized by Congress had in effect consented to the abrogation of that immunity.
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> *Edelman,* at 672.

Mere state participation in a federally-subsidized program does not establish consent by the states to suit in federal court in view of the Eleventh Amendment. *Edelman,* at 673. The distinction between *Edelman* and the *Parden* and *Petty* decisions remained intact. The majority opinion for the Fifth Circuit glossed over *Edelman* as supporting the proposition that "clear language" by Congress is the criteria for abrogation of immunity in the instant case. This conclusion is erroneous.

Following *Employees* and *Edelman,* the Supreme Court overruled *Wirtz* in *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) and held unconstitutional Congress' attempt to apply the Fair Labor Standards Act to most state and municipal employees (subsequent to the 1974 amendment which provided application of the law to those employees). Prior to *Wirtz,* the Fair Labor Standards Act applied to state and municipal workers only in hospitals, institutions and schools. By the 1974 amendment to the Fair Labor Standards Act, Congress provided application of the Act to include "public agencies" as employers and defined a public agency to include "the Government of the United States; the government of a state or political subdivisions thereof; . . ."[5] The Supreme Court reasoned that "Congress may not exercise that power so as to force upon the States its choices as to how essential decisions

[5]29 U.S.C. § 203 (x) (1970 ed., supp. IV).

regarding the conduct of integral governmental functions are to be made"[6] and decided that the Fair Labor Standards was not applicable to the States. The decision in *National League of Cities* does not, however, seem to preclude the Petitioner's suit herein as it was based upon the now discredited conclusion that traditional or integral activity is the inquiry.

> There are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may back an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising authority in that manner.
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> *National League of Cities,* at 845.

While the *National League of Cities* decision resolved temporarily the immunity of the States to Fair Labor Standards Act claims, *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) concluded that the Civil Rights Act of 1871 was intended by Congress to include municipalities and local government units for the purposes of a § 1983 action when the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.,* at 694. Although not discussed in *Monell,* it is curious to contrast *Ford Motor Co. v. Department of the Treasury,* 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945) which held that even though a State is not a named party to a suit, Eleventh Amendment immunity may apply if the action

[6]National League of Cities, at 855.

seeks to recover money damages from the state. Perhaps the lesson of *Monell* therefore, teaches that the State Department of Highways and Public Transportation in the case before this Court does not necessarily enjoy the immunity of the State as argued by the Respondents in the Fifth Circuit. Anticipating the agency immunity contention by the Respondent, the Petitioner does not quarrel with the obvious fact that since she sued both her government agency employer and the State of Texas that any judgment rendered on her behalf would be in all probability be paid from the State Treasury. However, in view of the *Monell* decision, such a recovery does not appear contrary to prior decisions of this Court.

The majority opinion relies heavily on *Atascadero State Hospital v. Scanlon,* 473 U.S. —, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) and *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. —, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Neither case supports a decision that Congress does not have exclusive power to regulate admiralty and maritime matters. *Garcia* involved yet another Fair Labor Standards Act case while *Atascadero* evolved from a claim by Scanlon for compensatory, injunctive and declaratory relief for violation of § 504 of the Rehabilitation Act of 1973.[7] The immediate distinction between *Garcia* and *Atascadero* and the case pending herein is that *Garcia* is a commerce clause matter whereas *Atascadero* stems from Fourteenth Amendment Rights.

In *Garcia* the Court overruled its decision in *National League of Cities v. Usery* and rejected ". . . a rule of

[7]87 Stat. 394, as amended, 29 U.S.C. 794.

state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'." *Garcia,* at 1016. The Court acknowledges the difficulty of formulating "objective criteria" to resolve the competing interests between the commerce power and state sovereignty. Justice Blackmun writes:

> The States unquestionably do 'retain a significant measure of sovereign authority'. *EEOC v. Wyoming,* 460 U.S., at 269, 103 S.Ct., at 1077 (Powell, J., dissenting). They do so. however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.
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> *Garcia,* at p. 1017.

The majority opinion relies upon *Garcia* and *Atascadero* to support the conclusion that this Court has established a "bright line" rule. The essence of this conclusion is that Petitioner's suit is barred by the Eleventh Amendment in the absence of express waiver by the State of Texas or "specific congressional language contained within the statute itself requiring the abrogation of sovereign immunity."[8] In *Atascadero,* Justice Powell stated repeatedly that express language by Congress was required in order to conclude that a State has waived its Eleventh Amendment immunity.

> Thus, we have held that a State will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction' ". *Edelman v. Jordan, supra,*

[8]*Welch,* at pp. 1272-73.

at 673 quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). Likewise, in determining whether Congress is exercising its Fourteenth Amendment powers has abrogated the States' Eleventh Amendment immunity, we have required "an unequivocal express of congressional intent to 'overturn the constitutionally guaranteed immunity of the several states.'" *Pennhurst II, supra,* at —, quoting *Quern v. Jordan,* 440 U.S. 332, 342 (1979).

Atascadero, 87 L.Ed .2d, at p. 178.

In relation to the contention of Scanlon that the enactment of the Rehabilitation Act abrogated the States' constitutional immunity this Court further stated:

To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh amendment bar to suits against the States in federal court. *Pennhurst II,* 465 U.S., at —; *Quern v. Jordan, supra,* at 342-345. We decline to do so, and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

Id., at p. 179.

The Court continues its analysis of the required findings and concludes:

For these reasons, we hold consitent with *Quern, Edelman* and *Pennhurst II,*—that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in that statute itself.

Id., at p. 180.

The Court reaffirmed the principle of *Quern* that "mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Id.,* at p. 182. The application of *Atascadero* to this Jones Act suit necessarily

taxes this Court to decide (1) whether the admiralty and maritime power granted to Congress by Art. III, § 2 of the Constitution is sufficient reason to abrogate the immunity of the State and (2) whether *Parden* and *Petty* are still viable thus allowing Petitioner to proceed with her suit.

Subsequent to *Atascadero* this Court decided *Green v. Mansour,* — U.S. —, 106 S.Ct. 423, — L.Ed.2d — (1985) and *Papasan v. Allain,* — U.S. —, 106 S.Ct. 2932, — L.Ed. 2d — (1986). Neither case involves Congress' power or regulation over admiralty and maritime matters. In *Green,* this Court reaffirmed the holding in *Quern v. Jordan* that the Eleventh Amendment bars the federal courts from issuing declaratory judgments against state officials when there is no ongoing violation of federal law. In *Papasan v. Allain,* the petitioners sought relief for breach of trust and denial of equal protection. This Court in a divided opinion held that Eleventh Amendment immunity applied to the breach of trust action but did not apply to the claim under equal protection. The rationale of the court insofar as the immunity defense is based on there being no distinction "between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities". *Id.,* 106 S.Ct. at 2942. The instant case should not be controlled by *Green* or *Papasan* unless this Court concludes that *Petty* and *Parden* are no longer viable in Eleventh Amendment case law.

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959) precedes *Parden.* Narrowly interpreted, *Petty* stands only for the proposition that the Jones Act applies to states which engage in maritime activities with a sue and be sued contractual clause ratified by Congress. A broad interpretation

of *Petty* is that it stands for the abrogation of Eleventh Amendment immunity under the Jones Act when states engage in the operation of a vessel on navigable waters. *Parden* suggests that *Petty* should be relied on as an abrogation of state immunity by entry into maritime activity by a state. The incorporation of the FELA[9] by the Jones Act is set forth in the statute itself.

> any seamen who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and *in such action all statutes of the United States modifying or extending the common law right or remedy in case of personal injury to railroad employees shall apply;* and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and *in such action on all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.* Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.
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> 46 U.S.C. § 688 (emphasis added).

The FELA provides in relevant part that:

> every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by any such carrier in such commerce . . . [and that] under this chapter an action may be brought in a district court of the United States.
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> 45 U.S.C. § § 51, 56.

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[9]45 U.S.C. 51, et seq. (Federal Employers Liability Act).

The difference between *Petty* and this case insofar as Eleventh Amendment immunity asserted by Respondent is that in *Petty* a bi-state corporation was formed which contained a "sue and be sued" clause ratified by Congress. Thus, this Court had no difficulty in concluding that the Jones Act applied to state-operated vessels.

> We can find no more reason for excepting state or bi-state corporations from 'employer' as used in the Jones Act than we could for excepting them from either the Safety Appliance Act (*United States v. California,* 297 U.S. 175, 80 L.Ed. 567, 56 S.Ct. 421) or the Railway Labor Act (*California v. Taylor,* 353 U.S. 553, 1 L.Ed. 2d 1034, 77 S.Ct. 1037). In the latter case we reviewed at length federal legislation governing employer-employee relationships and said, "When Congress wished to exclude state employees, it expressly so provided." 353 U.S. at 564. The Jones Act (46 U.S.C. § 688) has no exceptions from the broad sweep of the words "any seaman who shall suffer personal injury in the course of his employment may" etc. The rationale of *United States v. California* and *California v. Taylor* makes it impossible for us to mark a distinction here and hold that this bi-state agency is not an employer under the Jones Act.
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> *Petty,* at 282-283.

By contrasting *Petty* with *Atascadero,* significant differences are evident. First, the Jones Act creates a federal remedy for the seamon wiht specific reference to jurisdiction in the federal district courts. The claim of Scanlon in the *Atascadero* case is founded in title VI of the Civil Rights Act of 1964. Thus, the Fourteenth Amendment is the basis of the action in *Atascadero.* Second, the *Petty* decision does not turn in part on the issue that the state is a recipient of federal funds whose intent to waive immunity is important, but rather is based on the plenary power of

Congress to exclusively regulate admiralty and maritime activity. Whereas several decisions in the development of Eleventh Amendment immunity law are determined by a contest of competing state and federal interests between the federal commerce power and the states' immunity[10]—only *Petty* involves the admiralty and maritime power of Congress.

Third, the *Atascadero* reasoning to ascertain the appropriate constitutional balance between the federal and state government does not apply to *Petty* because states do not regulate *any facet* of admiralty or maritime activity. Therefore, a constitutional balance inquiry, as suggested in *Atascadero* is not required in this matter. It seems apparent from the foregoing that even without *Parden* that Petitioner can overcome the immunity defense urged by the state and upheld by the majority opinion of the Fifth Circuit.

> While states may sometimes supplement Federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court. These principles have been frequently declared and we adhere to them. See, e.g., *Garrett v. Moore-McCormack Company,* 317 U.S. 239, 243-246; 63 S. Ct. 246, 249-251, 87 L.Ed. 239 and cases cited therein. *Caldarola v. Eckert,* 332 U.S. 155, 67 S.Ct. 1569 (1968), does not support the contention that a state which undertakes to enforce federally created maritime rights can dilute claims fashioned by federal power, which is dominant in this field.
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> *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, at 409, 410, 74 S.Ct. 202 (1953).

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[10]See, e.g., *Employees v. Dept. of Public Health and Welfare; Edelman v. Jordan; Quern v. Jordan.*

Parden is the case most closely aligned with the facts in this matter. Were it not for the decisions in *Employees, Edelman, Garcia* and *Atascadero* which sway the majority of the Fifth Circuit from *Parden* and *Petty,* the resolution of this matter would be directly controlled by *Parden* and *Petty.* However, not one of the cases which seek to impose the requirement of unequivocal expression of congressional intent is limiting on *Parden.* In *Parden,* an employer filed an FELA claim against a railroad owned and operated by the State of Alabama. The District Court dismissed the suit and dismissal was affirmed by the Fifth Circuit on the ground of sovereign immunity. This Court reversed and held that since the defendant voluntarily engaged in the ownership and operation of a railroad in interstate commerce, that it impliedly waived its sovereign immunity defense.

> To read a sovereign immunity exception into the Act would result, moreover, in a right without a remedy; it would mean that Congress made 'every' interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be State owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result. We therefore read the FELA as authorizing suit in a Federal District Court against State owned as well as privately owned common carriers by railroad in interstate commerce.
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> *Parden,* at p. 190.

The issues resolved by Parden were that Congress did intend to subject a state to suit by state employees under the FELA and it had the power to do so.[11] Similarly, in

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[11]Parden, at p. 187.

United Transportation Union v. Long Island R. Co., 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982) the Court reaffirms *Parden*. That reaffirmation seemingly discredits the majority opinion of the Fifth Circuit requirements of explicit congressional intent contained within the act. The narrow issue upon which the court granted review in the *United Transportation Union* case was whether the Tenth Amendment prohibits application of the Railway Labor Act[12] to a state-owned railroad engaged in interstate commerce. Although the Court held the Railway Labor Act applicable to the state based upon the criteria set forth in *National League of Cities v. Usery*, a precise recitation was given as to Congress' authority to abrogate state immunity in the sphere of railroad operation pursuant to the commerce clause power.

> Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal regulatory regulation.
>
> *United Transportation Union*, at p. 1355

Just as the Railway Labor Act was applicable to the state by virtue of federal preemption (without a specific expression of intent in the statute itself.[13] as the majority

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[12]45 U.S.C. § 151, et. seq.

[13]In the Court of Appeals, the Railroad maintained that Congress did not intend the Act to apply to state-owned passenger railroads. 634 F.2d at 23. Whatever merit that claim may have had, it is no longer tenable. After that court rendered its decision, Congress amended the Act to add § 9A, 95 Stat. 681, 45 U.S.C. § 159a (1976 ed., Supp. V). Section 9A establishes special procedures to be applied to any dispute "between a publicly funded and publicly operated carrier providing rail commuter service . . . and its employees. *United Transportation Union, supra*, n. 4 at 1353.

states is required by *Atascadero*), the Jones Act must certainly abrogate the constitutionally guaranteed immunity of this Respondent.

The Respondent asserts that in the absence of legislative history clearly expressing the intent of the framers to apply the Jones Act to the states and abrogate its Eleventh Amendment immunity that this Court should not act otherwise. However, it has ben clearly demonstrated by the foregoing that the Jones Act abrogates the immunity of the state by its grant of plenary power pursuant to Article III, § 2 of the Constitution which grants Congress exclusive control over admiralty and maritime matters and in accordance with the *Petty* and *Parden* decisions of this Court.

II. EXPRESS WAIVER

The majority opinion of the Fifth Circuit concludes "that the State of Texas has not waived expressly its sovereign immunity beyond that contained in Section 19 of the statute which gives state employees coverage only under the Texas Workers' Compensation law if the agency has adopted that law." *Welch*, at p. 1274. Thus, the Fifth Circuit establishes by its decision an exception to the Jones Act for seamen employed by the State of Texas.

Article 6252-19, Sec. 3 of the Texas Tort Claims Act provides in relevant part:

> Each unit of government in *the state shall be liable for money damages for* property damage or *personal injuries* or death *when proximately caused by the negligence* or wrongful act or omission of any officer or employee acting within the scope of his employ-

ment or office *arising from the operation or use of a motor-driven vehicle and motor-driven equipment* . . . under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state.

Tex. Rev. Civ. Stat. Ann., Art. 6252-19, Sec. 3 (emphasis added).

Art. 6252-19, Sec. 4, thereafter provides:

To the extent of such liability created by Section 3, immunity of the sovereign to suit, as heretofore recognized and practiced in the State of Texas with reference to units of government, *is hereby expressly waived and abolished, and permission is hereby granted by the legislature to all claimants to bring suit against the State of Texas, or any and all other units of government covered by this Act, for all claims arising hereunder.*

Tex. Rev. Civ. Stat. Ann., Art. 6252-19, Sec. 4 (emphasis added).

Standing alone, the above Texas statutes directly and expressly waive Eleventh Amendment immunity. Petitioner was injured by the negligence of a co-employer in the use of a motor driven crane. The majority opinion of the Fifth Circuit acknowledges the applicability of § 3 (and presumably § 4 although that is not stated) but states the following:

> Section 19 of the Act, however, limits this waiver of immunity. It provides that a governmental unit carrying Texas Worker's Compensation Insurance is entitled to the 'privileges and immunities' granted by the Workers' Compensation Act to 'private persons and corporations'.
>
> *Welch,* at p. 1273.

The relevant provisions of Texas law which the Fifth Circuit concludes limit the § 4 waiver are the following:

> Any governmental unit carry Workmen's Compensation Insurance or accepting the provisions of the Workmen's Compensation Act of the State of Texas shall be entitled to all of the privileges and immunities granted by the Workmen's Compensation Act of the State of Texas to private persons and corporations.
>
> *Tex. Rev. Civ. Stat. Ann,* art. 6252-19 § 19.
>
> Employees of the Department[14] and parents of minor employees shall have no right of action against the agents, servants, or employees of the Department for damages for personal injuries nor shall representatives and beneficiaries of deceased employees have a right of action against the agents, servants, or employees of the Department for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Department as is provided in this law . . .
>
> *Tex. Rev. Civ. Stat. Ann.* art 6674s, § 6.

The apparent conflict between § 4 waiver and the exclusive workers compensation remedy as set forth above is resolved by the Fifth Circuit for Respondent on the case of *Lyons v. Texas A & M University,* 545 S.W.2d 56 (Tex. Civ. App. 1976). In *Lyons,* a seaman sued Texas A & M pursuant to the Jones Act, the Texas Tort Claims Act and the general maritime law for injuries sustained in the course of

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[14]Department refers to the Respondent, State Department of Highways and Public Transportation which employed Welch.

his employment. The district court dismissed the suit holding that the exclusive remedy for Lyons was the workmen's compensation statute. The state appellate court affirmed and held (1) the state is immune from the general maritime law claim by *Ex Parte New York;* (2) the Texas Tort Claim Act § 19 limitation precluded the plaintiff's claim under that law and; (3) the state was immune from the Jones Act claim because Lyons was a "workman" and not a "seaman". The final holding was necessary to prohibit the suit because "the general compensation law provides coverage for 'employees', and the definition of 'employees' exclude 'seaman on vessels engaged in interstate or foreign commerce . . . ' Tex. Rev. Civ. Stat. Ann. art. 8309, § 1 (1967). This exclusion of seamen from workmen's compensation statute was made necessary by a series of Supreme Court decisions beginning with *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)." *Lyons,* at 59. The court concluded that Lyons (a cook on a vessel in navigation) was therefore a "workman" employed by Texas A & M University. Whereas the majority of the court below find that a "tortured interpretation" is required to conclude express waiver in Texas law, Petitioner suggests that such an interpretation is no more tortured than the state appellate court's distinction between seaman and workman.

Prior to *Lyons,* the decision in *Flores v. Norton & Ramsey Lines, Inc.,* 352 F.Supp. 150 (W.D. Tex. 1972) held that "the Texas Legislature expressly waived sovereign immunity in suits against the State of Texas under the Texas Tort Claims Act in federal as well as state courts . . ." *Id.* at 154. Furthermore, *Flores* stated, "Section 13 of the Texas Act states: 'this Act shall be liberally

construed to achieve the purposes hereof.' Thus, any ambiguity in the Act ought to be construed in favor of the claimant." *Id.* at 156. As *Flores* did not involve a seaman's Jones Act claim, the application is limited to the issue of express waiver. However, the limited application does support Petitioner's claim that an express waiver has been given by the state in § 4 of the Act and the ambiguity created by the Worker's Compensation Act should be construed against the State.

J. Cire, who authored the district court opinion in this case, and the *Lyons* decision also decided *Mifsud v. Palisades Geophysical Institute, Inc.,* 484 F.Supp. 159 (S.D. Tex. 1980). Therein, the Court held that Texas had not consented to Jones Act suits because the state workmen's compensation statute was an exclusive remedy. However, if Plaintiff should establish that he was a third party, non-employee of the state agency, then he could sue in federal court only in a maritime negligence action. The reconciliation of *Lyons and Mifsud* escapes this Petitioner for if Mifsud was not an employee of the state, he has no Jones Act claim. Similarly, in *Lyons* it was held that general maritime law actions against the state were precluded by *Ex Parte New York.* Lyons, Mifsud and now Welch are disenfranchised of their Jones Act rights by this tortured interpretation of state law. To conclude otherwise would render meaningless the principle that the seaman's Jones Act rights may not be precluded by the enactment of state worker's compensation statute as an exclusive remedy. See, e.g. *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917); *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 74 S. Ct. 202, 98 L.Ed. 143 (1953); *In re Holoholo Litigation,* 557 F.Supp. 1024 (D.Haw.

1983); *Roberts v. City of Plantation*, 558 F.2d 751 (5th Cir. 1977); *Thibodeaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), cert. den., 442 U.S. 909, 99 S.Ct. 2820 (1979); *Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980).

The holding in *Lyons* that "The state, however, is immune from suit without its consent. It could provide any remedy it wished and limit seaman to that remedy exclusively" is erroneous and should be corrected by this Court's decision.

The state of Texas has expressly waived immunity in §§ 3 and 4 of the Texas Tort Claims Act and this Court should therefore reverse the decision of the Fifth Circuit herein.

CONCLUSION

Petitioner Welch respectfully suggests that the decision of the Fifth Circuit Court of Appeals should be overruled by this Court and this case remanded to the United States District Court, Southern District of Texas for trial.

In support of this conclusion, Petitioner submits that the Jones Act abrogates state Eleventh Amendment by virtue of the powers granted the Federal Government pursuant to Article 3, § 2 of the U.S. Constitution.

Furthermore, Petitioner submits that the decision of the Court of Appeals should be reversed on the grounds that the State of Texas has constructively waived its immunity granted by the Eleventh Amendment by entry into

an exclusively regulated sphere of activity, i.e., admiralty and maritime matters.

Finally, Petitioner respectfully suggests that the State of Texas has expressly waived its Eleventh Amendment immunity by enactment of the aforesaid provisions of the Texas Tort Claims Act.

WHEREFORE, Petitioner Jean E. Welch respectfully prays that the decision of the U.S. Court of Appeals for the Fifth Circuit be reversed and this matter and this case be remanded to the United States District Court for trial.

Respectfully submitted,

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